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PREVIEW—Park County Environmental Council v. Montana Department of Environmental Quality: A Test of Montana's Right to a Clean and Healthful Environment

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**PREVIEW—Park County Environmental Council v.
Montana Department of Environmental Quality: A Test of
Montana’s Right to a Clean and Healthful Environment**

Liz M. Forster*

The Supreme Court of Montana will hear oral arguments in this matter on Wednesday, September 30, 2020, at 9:30 a.m. in the Mazurek Justice Building in Helena, Montana. Edward Hayes, Special Assistant Attorney General, will likely argue for Appellant Montana Department of Environmental Quality. KD Feedback will likely appear for Appellant Lucky, Inc. Deputy Attorney General Robert Cameron will likely appear of the State of Montana. Jenny K. Harbine will likely argue for Appellees, Park County Environmental Council and Greater Yellowstone Coalition.

I. INTRODUCTION

This case challenges a key provision of Montana’s bedrock environmental law—the Montana Environmental Policy Act (“MEPA”)¹—and tests the judicial power of the state’s constitutional right to a clean and healthful environment to issue injunctions to prevent environmental harm. The Montana Sixth Judicial District granted motions for summary judgment and for vacatur filed by Park County Environmental Council and Greater Yellowstone Coalition (“Appellees”) to vacate an exploration license issued to Lucky Minerals, Inc. (Lucky) the Montana Department of Environmental Quality (“DEQ”). DEQ and Lucky appealed the decision to the Montana Supreme Court (“the Court”). The State of Montana (“State”) intervened after the appeal. *Park County Environmental Council v. Montana Department of Environmental Quality* asks whether: (1) Appellees have standing in the case, (2) the district court properly determined that DEQ’s environmental review for Lucky’s project violated MEPA, and (3) the MEPA provision barring courts from issuing injunctions when an agency’s environmental review violates MEPA² is constitutional.³

II. FACTUAL AND PROCEDURAL BACKGROUND

In February 2015, Lucky applied for a license from DEQ to conduct mining exploration activities within the St. Julian Claim Block⁴

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1. MONT. CODE ANN. § 75-1-101 (2019).
2. *Id.* § 75-1-201(6)(c), (d).
3. Response Br. Pls.-Appellees Park Cty. Env’tl. Council and Greater Yellowstone Coal. at *1, Jan. 27, 2020, No. DA 19-0492.
4. Opening Br. Def./Appellant Mont. Dep’t of Env’t Quality at *6, Nov. 27, 2019, No. DA 19-0492.

located in Emigrant Gulch just outside the Absaroka-Beartooth Wilderness and Yellowstone National Park.⁵ The St. Julian Claim Block is privately owned and contains eight patented mining claims.⁶ The area produced about 40,000 ounces of gold between 1864 and 1930.⁷ Between 1963 and 1993, mining companies periodically explored the area for minerals, though none proceeded with extraction.⁸

Emigrant Gulch provides habitat for several species listed as threatened under the Montana's Nongame and Endangered Species Conservation Act⁹ and the federal Endangered Species Act,¹⁰ notably, grizzly bear and Canada lynx. The area also is home to wolverine—designated as a species of concern in Montana¹¹—bighorn sheep, elk, deer, moose, marmots, coyotes, black bears, and wolves.¹²

Outdoor recreationists frequent Emigrant Gulch, helping to employ many Park County residents.¹³ For instance, creeks running through the project area drain into the Yellowstone River—a world-renowned trout fishery.¹⁴ Emigrant Peak and the natural mineral pools of Chico Hots Springs at the mouth of the gulch attract year-round recreationalists, including hikers and backcountry skiers.¹⁵

The federal government recognized Emigrant's ecological and recreation value in 2019 when it permanently banned new gold mines.¹⁶ The ban, championed by Montana Senator Jon Tester and Montana Representative Greg Gianforte, spreads across 30,000 acres of federal land in the Absaroka and Beartooth mountain ranges.¹⁷

Lucky's license application proposed drilling of up to 46 drill holes in 23 locations for nearly 24 hours a day over two three-month field seasons.¹⁸ DEQ drafted an environmental assessment ("EA") for the proposed project in October 2016.¹⁹ After a public comment period, DEQ concluded in its Final EA that Lucky's proposed activity would not

5. Resp. Br. Pls.-Appellees at *4.

6. Opening Br. Def./Appellant DEQ at *7.

7. Opening Br. Def./Appellant DEQ at *7.

8. Opening Br. Def./Appellant DEQ at *7; Mont. Dep't of Env't Quality, Final Envtl. Asses.: Expl. License Appl. #00795 at 3–4 (2017).

9. MONT. CODE ANN. § 87-5-101.

10. 16 U.S.C.A. § 1531 (2020).

11. Order Ruling Pls.' Mot. Vacatur of Expl. License, 3:23–25, April 12, 2019, No. DV-17-126. Mont. Nat. Heritage Program, *Montana Natural Heritage – SOC Report: Animal Species of Concern, Mammals*, <http://mtnhp.org/SpeciesOfConcern/?AorP=a&OpenFolders=S&Species=Mammals>.

12. Order Ruling Pls.'s Mot. Vacatur 3:21–23.

13. Order Ruling Pls.'s Mot. Vacatur 4:8–9.

14. Order Ruling Pls.'s Mot. Vacatur 4:6–7.

15. Order Ruling Pls.'s Mot. Vacatur 4:3–6.

16. Pub. L. No. 116-9 § 1204, 133 Stat. 580 (2019).

17. *Id.*

18. Decision Regarding Cross-Mot. Summ. J. Filed by Pls. and DEQ 2:23–25, May 23, 2018, No. DV 17-126.

19. Decision Cross-Mot. Summ. J. 3:6–7.

significantly impact the quality of the human environment and approved Lucky's application on July 26, 2017.²⁰

Appellees sued DEQ and Lucky on September 22, 2017, in the Montana Sixth Judicial District Court in Park County, challenging DEQ's finding of no significant impact and approval of Lucky's license without producing an environmental impact statement ("EIS").²¹ On review of cross-motions for summary judgment, the district court ruled that DEQ's decision was "arbitrary, capricious and not supported by substantial evidence."²² The district court found that, contrary to DEQ's conclusion, the record showed substantial impacts on wildlife and water resources, and thus significant environmental impacts.²³ Accordingly, the district court held that DEQ violated MEPA and granted Appellees' motion for summary judgment.²⁴

Appellees then filed a motion requesting that the district court issue an injunction and vacate the license.²⁵ Since MEPA does not allow courts to grant injunctions when overturning an agency's environmental review,²⁶ Appellees' motion claimed the provision violated Montana's constitutional guarantee to a clean and healthful environment.²⁷ The State intervened to defend the provision's constitutionality.²⁸

The district court granted Appellee's motion and concluded that the at-issue provision of MEPA is unconstitutional because it eliminates a court's ability to prevent environmental harm when an agency violated MEPA.²⁹ DEQ, Lucky, and the State appealed to the Montana Supreme Court.

III. SUMMARY OF ARGUMENTS

The parties disagree on: (1) whether Appellees—two environmental organizations—have standing in the case, (2) whether DEQ's EA violated MEPA, and (3) the constitutionality of the MEPA provision barring courts from issuing injunctions when an agency's environmental review violates the statute.

A. *Appellants' Arguments*

Appellants argue the following: (1) Appellees do not have standing because the alleged injuries are speculative, (2) the Final EA does

20. Decision Cross-Mot. Summ. J. 3:6–9.
21. Decision Cross-Mot. Summ. J. 3:11–12.
22. Decision Cross-Mot. Summ. J. 30:11–12.
23. Decision Cross-Mot. Summ. J. 30:13–31:1–8.
24. Decision Cross-Mot. Summ. J. 32:5–6.
25. Order Ruling Pls.'s Mot. Vacatur at 2.
26. MONT. CODE ANN. § 75-1-201(6)(c), (d).
27. Order Ruling Pls.'s Mot. Vacatur at 2.
28. Order Ruling Pls.'s Mot. Vacatur at 2.
29. Order Ruling Pls.'s Mot. Vacatur at 17.

not violate MEPA, and (3) the at-issue MEPA provision is constitutional under a balancing test because the statute is procedural.

1. Standing

Lucky asserts that Appellees lack standing to bring their claim because their alleged injuries are speculative and vague.³⁰ Appellees claim harm to their business, property, and recreational and aesthetic interests.³¹ Lucky argues those claims are based on unsupported allegations in Appellees' affidavits, and argue the allegations are therefore too vague for a court to find a concrete injury.³² As evidence, Lucky references a non-specific statement by Appellee member Michelle Uberuaga of general opposition to exploratory drilling, mineral exploration, and proposed industrial scale development of Emigrant Gulch.³³ Lucky argues that Uberuaga's affidavit and others like it that Appellees submitted are too vague to confer standing.

2. Sufficiency of DEQ's Environmental Review under MEPA

DEQ challenges the district court's determination that DEQ's finding of no significant impact was arbitrary, capricious, and a violation of MEPA. DEQ assert that Appellees, and subsequently the district court, cherry-picked the portions of the EA to show an environmental impact and inconsistency between its findings and conclusion.³⁴ Thus, DEQ concludes that Appellees' and the district court's findings are not representative of the project's actual environmental impact.³⁵

DEQ primarily take issue with the district court's determination that it selectively relied on certain water quality data to affirm its conclusion that Lucky's discharges would not contaminate water or cause other significant environmental impacts.³⁶ For instance, in its Final EA, DEQ analyzed the volume and acidity of the possible artesian flow³⁷ on

30. Reply Br. Appellant Lucky Minerals, Inc. at *4–6, Feb. 2, 2020, No. DA 19-0492.

31. Resp. Br. Pls.-Appellees at *13.

32. Reply Br. Appellant Lucky at *6–7.

33. Reply Br. Appellant Lucky at *6–7.

34. Reply Br. Appellant Lucky at *12; Opening Br. Def./Appellant DEQ at *17–18.

35. Opening Br. Def./Appellant DEQ at *17–18.

36. Opening Br. Def./Appellant DEQ at *20.

37. Artesian water is groundwater in aquifers between layers of poorly permeable rock, like clay or shale. Normally, artesian water is confined in the ground under pressure. If the aquifer is tapped by a well—or in this case a drill—the water trapped between the layers of rock will rise to the top of the aquifer and sometimes above ground. *Artesian Water and Artesian Wells*, U.S. GEOLOGICAL SURVEY available at https://www.usgs.gov/special-topic/water-science-school/science/artesian-water-and-artesian-wells?qt-science_center_objects=0#qt-science_center_objects.

the north and south sides of the East Fork of Emigrant Creek.³⁸ While samples taken on the north side of the creek were acidic, and thus have the potential to send acid rock drainage downstream, the samples taken on the south side did not contain the naturally-occurring chemicals that would lead to acid rock drainage.³⁹ Since the proposed project area sits predominately on the south side of the creek,⁴⁰ DEQ argues that its data does not implicate potential water contamination or a significant environmental impact under MEPA.⁴¹

DEQ also turns Appellees' own cherry-picking argument against them.⁴² First, DEQ asserts that Appellees' own data demonstrating contaminated artesian flow is arbitrary because they analyzed water samples from comparable exploration sites in Alaska.⁴³ DEQ's data, on the other hand, comes from Lucky's proposed exploration site.⁴⁴ Next, DEQ asserts that Appellees lifted case law out of context to support their opposition to the project.⁴⁵ For instance, DEQ claims that Appellees misstate the agency's obligation to evaluate alternatives in the Final EA, as explained by *Citizens Against Burlington, Inc. v. Busey*.⁴⁶ While Appellees quote the case to say that the agency must evaluate alternatives to achieving the *project's* goals, according to DEQ, the case requires agencies to evaluate alternative ways of achieving the *agency's* goals.⁴⁷

Importantly, DEQ does not contest the district court's ruling that DEQ inadequately assessed the impacts of road improvements on wildlife.⁴⁸ DEQ also do not contest the district court's determination that DEQ should have assessed the effectiveness of specific water contamination mitigation plans, rather than simply require that Lucky develop such plans later.⁴⁹ DEQ concedes that it should have identified and evaluated the effectiveness of specific mitigation measures in its Final EA.⁵⁰

38. Dep't of Env't Quality, Final Env'tl. Asses.: Expl. License Appl. #00795 at 95 (2017).

39. Opening Br. Def./Appellant DEQ at *17-18.

40. Dep't of Env't Quality, Final Env'tl. Asses.: Expl. License Appl. #00795 at 95 (2017).

41. Opening Br. Def./Appellant DEQ at *17-18.

42. Response Br. Def./Appellant Mont. Dep't of Env'tl. Quality at *1-2, 9, Feb. 10, 2020, No. DA 19-0492.

43. Response Br. Def./Appellant DEQ at *1-2.

44. Response Br. Def./Appellant DEQ at *1-2.

45. Response Br. Def./Appellant DEQ at *9.

46. Response Br. Def./Appellant DEQ at *9 (citing 938 F.2d 190, 199 (D.C. Cir. 1991)).

47. Response Br. Def./Appellant DEQ at *11-12 (emphasis added).

48. Opening Br. Def./Appellant DEQ at n.1.

49. Opening Br. Def./Appellant DEQ at *14.

50. Opening Br. Def./Appellant DEQ at *14.

3. Constitutionality of MEPA

Lastly, the State argues for the constitutionality of the provision of MEPA that bars the courts from issuing injunctions when it finds that an agency's environmental review violates MEPA.⁵¹ The State's argument rests on the idea that MEPA is a procedural—not substantive—law, and thus is not intended to uphold the constitutional right to a clean and healthful environment.⁵² The State argues that the relevant provision of MEPA, therefore, is not intended to provide a remedy for environmental harm and such a remedy would be inappropriate.⁵³

The State encourages the court to differentiate between the purposes of procedural and substantive environmental laws. As a procedural law,⁵⁴ it claims MEPA seeks to inform the legislature and the public about whether Montana's substantive environmental protection laws like the Clean Air Act, Water Quality Act, and Metal Mine Reclamation Act are functioning properly.⁵⁵ EAs and EISs are key tools agencies use to achieve this goal.⁵⁶ Conversely, substantive environmental protection laws provide the regulatory authority and remedies, like injunctions, for environmental harm.⁵⁷ Accordingly, providing courts with the authority to issue injunctions under MEPA contradicts the legislature's intent for the statute to serve as a procedural law.⁵⁸

Furthermore, the State asserts that the Montana Supreme Court must balance the right to a clean and healthful environment and private property rights, rather than apply strict scrutiny to one right;⁵⁹ applying strict scrutiny would improperly give one fundamental right more weight than the other.⁶⁰ Under this balancing test, the State contends the MEPA provision is constitutional.⁶¹

B. Appellees' Arguments

Appellees contend that (1) they have standing because they sufficiently allege both substantive and procedural injuries, (2) Appellants' EA violated MEPA because it failed to properly consider

51. Appellant State of Montana's Opening Br. at *2, Nov. 29, 2019, No. DA 19-0492.

52. Appellant State of Montana's Opening Br. at *18.

53. Appellant State of Montana's Opening Br. at *17–18, 21–23.

54. Appellant State of Montana's Opening Br. at *12 (citing *Mont. Wilderness Ass'n v. Bd. of Health and Env'tl. Sciences*, 559 P.2d 1157, 1161 (Mont. 1976) (“Nowhere in the MEPA is found any regulatory language.”)).

55. Appellant State of Montana's Opening Br. at *18 (citing to MONT. CODE ANN. § 75-1-102(1)).

56. See MONT. CODE ANN. § 75-1-102(3)(a).

57. Appellant State of Montana's Opening Br. at *21–23.

58. Appellant State of Montana's Opening Br. at *18.

59. Appellant State of Montana's Opening Br. at *6.

60. Appellant State of Montana's Opening Br. at *8 (citing *Galt v. State*, 731 P.2d 912, 916 (Mont. 1987)).

61. Appellant State of Montana's Opening Br. at *31.

certain environmental harms in its finding of no significant impact, and (3) the at-issue MEPA provision is unconstitutional under strict scrutiny because the drafters of the right to a clean and healthful environment intended it to prevent environmental harm.

1. Standing

First, Appellees argue they have a substantive injury under the Montana Constitution. They argue that courts have repeatedly affirmed plaintiffs' standing with a proper showing the challenged activities will potentially impact wildlife, increase noise and traffic, and decrease property values.⁶² Affidavits from members of both organizations show that allowing the project to move forward as planned will harm Appellees' enjoyment of their lives, as well as the aesthetic and recreational values of the project area.⁶³ These affidavits, Appellees argue, constitute standing.

Second, Appellees contend that DEQ's failure to adequately consider those substantive injuries in its finding of no significant impact violates of MEPA and claim that a violation of MEPA gives Appellees procedural standing.⁶⁴

2. Sufficiency of Appellants' Environmental Review under MEPA

Appellees assert that DEQ's assessment of the project's environmental impacts is flawed and irrational.⁶⁵ In particular, they allege that DEQ failed to rationally evaluate harm to wildlife from road improvements into remote habitat, potential contamination of water resources from artesian flow, and the effectiveness of specific water contamination mitigation measures.⁶⁶ Furthermore, Appellees claim that DEQ blindly deferred to Lucky when it rejected alternatives to the proposed project that would have mitigated environmental harm but decreased the scope of Lucky's exploration project.⁶⁷ Because DEQ failed to sufficiently evaluate these components of the projects, Appellees contend that DEQ did not "take a hard look" at the environmental impacts of the proposal project, and thus violated MEPA in its finding of no significant impact.⁶⁸

Appellees note that DEQ found in its Draft EA that improving the access road would impact wildlife populations.⁶⁹ Specifically, DEQ noted that the road improvements would provide hunters and motor vehicles

62. Resp. Br. Pls.-Appellees at *13 (citing *Heffernan v. Missoula City Council*, 255 P.3d 80, 91 (Mont. 2011); *Aspen Trails Ranch, LLC v. Simmons*, 230 P.3d 808, 818 (Mont. 2010)).

63. Resp. Br. Pls.-Appellees at *13 (quoting *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 484 (9th Cir. 2000) (quotation and citation omitted)).

64. Resp. Br. Pls.-Appellees at *12.

65. Resp. Br. Pls.-Appellees at *16.

66. Resp. Br. Pls.-Appellees at *16-17.

67. Resp. Br. Pls.-Appellees at *30.

68. Resp. Br. Pls.-Appellees at *17.

69. Resp. Br. Pls.-Appellees at *18.

access to remote parts of the Emigrant Creek drainage.⁷⁰ Further, DEQ found that better access would result in high rates of harassment, poaching, and mortality among wildlife.⁷¹ The impact on wolverines, in particular, would be detrimental, it said, because the increase in human disturbances may prompt female wolverines to abandon their dens.⁷² Appellees further point to a key comment submitted by Montana Fish Wildlife and Parks that reads, “The road improvements would represent a permanent change to the landscape, with long-term implications for habitat suitability and productivity of the area for wildlife.”⁷³

Despite this evidence, Appellees note, the DEQ wrote in its Final EA that it overstated the impacts on wildlife of the road improvements in its Draft EA.⁷⁴ The agency also wrote that the “clearing and localized improvements to Emigrant Creek Road . . . will not materially change its character.”⁷⁵ Finally, Appellees point out that DEQ did not provide an explanation for its recharacterization.⁷⁶

As to DEQ’s assessment of the potential water contamination, Appellees assert that DEQ ignored samples showing acidity at the project site, while relying on samples taken at a lower depth than where Lucky plans to drill.⁷⁷ Appellees, therefore, contend that DEQ failed to explain why it chose to rely only on certain data and how that justified its determination that the project would not contaminate water.⁷⁸

DEQ’s minimization of these harms, Appellees allege, demonstrates that DEQ “blindly deferred” to Lucky’s goals—an act that violates MEPA.⁷⁹ Appellees concede that case law permits DEQ to consider the statute’s objectives in light of Lucky’s goals;⁸⁰ however this does not relieve DEQ of its responsibility to scrutinize Lucky’s contestations that the proposed alternatives would prevent them from meeting the project objectives.⁸¹ Since DEQ did not fulfill that

70. Resp. Br. Pls.-Appellees at *18 (citing Dep’t of Env’t Quality, Draft Envtl. Asses.: Expl. License Appl. #00795 at 58 (2016)).

71. Resp. Br. Pls.-Appellees at *18 (citing Dep’t of Env’t Quality, Draft Envtl. Asses.: Expl. License Appl. #00795 at 58 (2016)).

72. Resp. Br. Pls.-Appellees at *18 (Dep’t of Env’t Quality, Draft Envtl. Asses.: Expl. License Appl. #00795 (2016)).

73. Resp. Br. Pls.-Appellees at *19.

74. Resp. Br. Pls.-Appellees at *20.

75. Dep’t of Env’t Quality, Final Envtl. Asses.: Expl. License Appl. #00795 at 62 (2017).

76. Resp. Br. Pls.-Appellees at *20.

77. Resp. Br. Pls.-Appellees at *27.

78. Resp. Br. Pls.-Appellees at *3 (quoting *Mont. Wildlife Fed’n v. Mont. Bd. of Oil & Gas Conservation*, 280 P.3d 877, 889 (Mont. 2012)).

79. Resp. Br. Pls.-Appellees at *30–31.

80. Resp. Br. Pls.-Appellees at *31 (citing *BioDiversity Conservation All. v. Bureau of Land Mgmt.*, 608 F.3d 709, 715 (10th Cir. 2010) (agency “may give substantial weight to the goals and objectives” of applicant) (quotation and citation omitted)).

81. Resp. Br. Pls.-Appellees at *31 (citing *S. Utah Wilderness All. v. Norton*, 237 F.Supp.2d 48, 52–54 (D.D.C. 2002) (“BLM violated NEPA where it rejected alternatives based on its “unquestioning acceptance of the statements of

responsibility when it outright rejected project alternatives, Appellees claim that it failed to conduct an independent analysis and take a hard look at the project’s environmental impacts pursuant to MEPA.⁸²

3. Constitutionality of MEPA

In its constitutional challenge to MEPA, Appellees assert that MEPA’s remedial restrictions violate their right to a clean and healthful environment⁸³ since the at-issue provision prevents courts from issuing equitable remedies to prevent environmental harm before an agency has properly evaluated those consequences.⁸⁴

Appellees rely on the seminal case adjudicating Montanan’s constitutional right to a clean and healthful environment—*Montana Environmental Information Center v. Department of Environmental Quality* (“*MEIC*”).⁸⁵ The plaintiffs in *MEIC* challenged an amendment to the Water Quality Act excluding activities that would degrade high-quality waters from a form of review otherwise required for degradation of Montana waters.⁸⁶ In analyzing the claim, the court held that the right to a clean and healthful environment is fundamental under the Montana Constitution, and that courts should apply strict scrutiny to claims implicating that right.⁸⁷

The court also concluded that the delegates who incorporated the right to a clean and healthful environment into the Montana Constitution in 1972 intended to provide “protections which are both anticipatory and preventative.”⁸⁸ In applying strict scrutiny with the understanding that environmental degradation should be prevented, not merely remediated, the court in *MEIC* found the Water Quality Act exemption unconstitutional.⁸⁹

Appellees contend that the statutory elimination of injunctions under MEPA is analogous to the unconstitutional exemption at issue in *MEIC*.⁹⁰ They claim that the rules at issue in both cases eliminate statutory protections against impacts like those implicated by the degradation

[project applicants] that limiting their operations to existing roads and trails would not meet the project objectives.”)).

82. Resp. Br. Pls.-Appellees at *32.

83. Resp. Br. Pls.-Appellees at *37.

84. Resp. Br. Pls.-Appellees at *43.

85. Resp. Br. Pls.-Appellees at *33–34 (citing *Mont. Env’t Info. Ctr. v. Dept. of Env’t Quality*, 988 P.2d 1236 (Mont. 1999)).

86. Resp. Br. Pls.-Appellees at *44 (citing *Mont. Env’t Info. Ctr.*, 988 P.2d at 1239).

87. Resp. Br. Pls.-Appellees at *43 (citing *Mont. Env’t Info. Ctr.*, 988 P.2d at 1246).

88. Resp. Br. Pls.-Appellees at *38 (citing *Mont. Env’t Info. Ctr.*, 988 P.2d at 1249).

89. Resp. Br. Pls.-Appellees at *43 (citing *Mont. Env’t Info. Ctr.*, 988 P.2d at 1249).

90. Resp. Br. Pls.-Appellees at *43–44.

exemption and Lucky's project.⁹¹ At the same time, the at-issue rules both permit activities with environmental consequences without environmental reviews that would otherwise be required.⁹² Such eliminations contradict the anticipatory and preventative purpose of Montana's right to a clean and healthful environment.⁹³ MEPA, Appellees argue, would become "a meaningless paperwork exercise" by divesting the courts from their power to uphold the State's duty under the Montana Constitution to prevent degradation of the environment.⁹⁴

Appellees conclude their constitutional argument with an application of strict scrutiny.⁹⁵ Encouraging private, industrial development is not a compelling government interest that justifies eliminating public remedies protecting a fundamental right.⁹⁶ Accordingly, Appellees argue, the provision is unconstitutional.⁹⁷

IV. ANALYSIS

This case involves both a fact-intensive issue specific to this case and a broader legal issue that tests the strength of Montanans' right to a clean and healthful environment. The court's decision on the latter issue could completely reorient the way that Montana reviews proposals for industrial development, and ultimately, what kinds of industrial development the state allows. The court's analysis of the Final EA will likely involve a close examination of the facts presented by each party, whereas the court's analysis of the constitutionality of the at-issue provision of MEPA will hinge on legislative intent and case precedent.

The Montana legislature enacted MEPA in 1971 to encourage harmony between humans and their environment.⁹⁸ This harmony balances two fundamental rights under the Montana Constitution: the right to a clean and healthful environment and the right to use and enjoy private property.⁹⁹ The former right was thought by its founders to be "the

91. Resp. Br. Pls.-Appellees at *44.

92. Resp. Br. Pls.-Appellees at *44 (citing *Mont. Env't Info. Ctr.*, 988 P.2d at 1239).

93. Resp. Br. Pls.-Appellees at *38 (citing *Mont. Env't Info. Ctr.*, 988 P.2d at 1249; MONT. CONST., art. II, § 3, art. IX, § 1). *See also* Resp. Br. Pls.-Appellees at 37 (Appellees describe this purpose as a "look before you leap mandate").

94. Resp. Br. Pls.-Appellees at *37 (citing MONT. CONST. art. II, § 3; art. IX, § 1).

95. Resp. Br. Pls.-Appellees at *48–51.

96. Resp. Br. Pls.-Appellees at *49–50.

97. Resp. Br. Pls.-Appellees at *45.

98. § 75-1-102(2).

99. MONT. CONST. art. II, § 3 ("All persons . . . have certain inalienable rights. They include the right to a clean and healthful environment and the rights of . . . acquiring, possessing and protecting property.").

strongest environmental protection provision found in any state constitution.”¹⁰⁰

The right to a clean and healthful environment articulated in Article II, Section 3, is paired with Article IX, Section 1,¹⁰¹ which requires the state and its citizens to ensure a clean and healthful environment in Montana for present and future generations.¹⁰² Additionally, the legislature must provide adequate remedies to protect the environment from unreasonable depletion and degradation.¹⁰³

Under MEPA, state agencies must take a “hard look” at the environmental impacts of a given proposal to determine its significance.¹⁰⁴ The agency’s analysis is designed to help the state make informed decisions, not require an agency to make specific substantive decisions.¹⁰⁵ When an agency is unsure whether a project may generate significant impacts, the agency may prepare an EA to determine the potential significance.¹⁰⁶ If the EA demonstrates that the project will have significant impacts, the agency must prepare a lengthier document called EIS to further explore those impacts.¹⁰⁷ If it finds no significant impact in its EA, the agency can proceed with approving the proposed project.¹⁰⁸

A. *Standing*

The court will likely find that Appellees have standing. To show standing, the plaintiff must allege a “past, present, or threatened injury to a property or civil right.”¹⁰⁹ In cases that implicate the right to a clean and healthful environment, the court has repeatedly found standing when plaintiffs challenge a proposed action based on the potential impacts to wildlife, noise and traffic, and property values.¹¹⁰ For instance, in *Heffernan*, residents of a Missoula neighborhood living next to a proposed subdivision sued to stop the subdivision’s approval because the new homes and increase in vehicle traffic would significantly and negatively alter the neighborhood.¹¹¹ One of the plaintiffs alleged that the subdivision would adversely impact their enjoyment of their home’s natural and rural

100. Mont. Env’t Info. Ctr. v. Dept. of Env’t Quality, 988 P.2d 1236, 1246 (Mont. 1999) (citing Mont. Constitutional Convention, Vol. IV at 1200, March 1, 1972).

101. *Id.* at 1249.

102. MONT. CONST. art. IX, § 1(1).

103. MONT. CONST. art. IX, §1(3).

104. Ravalli Cty. Fish and Game Ass’n, Inc. v. Mont. Dept. of State Lands, 903 P.2d 1362, 1367 (Mont. 1995).

105. *Id.* at 377–78.

106. MONT. ADMIN. R. 4.2.314(3)(a) (2020).

107. MONT. ADMIN. R. 4.2.314(1)(a).

108. MONT. ADMIN. R. 4.2.314(2)(d).

109. *Heffernan v. Missoula City Council*, 255 P.3d 80, 91 (Mont. 2011).

110. *Id.* at 94; *Aspen Trails Ranch, LLC v. Simmons*, 230 P.3d 808, 818 (Mont. 2010).

111. *Heffernan*, 255 P.3d at 209, 224.

character, including the viewshed and wildlife.¹¹² In *Aspen Trails*, the court found standing when a landowner alleged that a proposed subdivision would alter the course of the nearby stream channel and increase noise, traffic, and light pollution.

Appellees filed affidavits from their members in the district court alleging that the project would harm their businesses, property, recreational, and aesthetic interests.¹¹³ One affidavit alleged the project would disrupt valuable wildlife habitat, inject noise into a quiet landscape, jeopardize water quality, and harm recreational interests. Given the evidence, and its parallels to the case precedent, the court would likely find that Appellees had standing.

B. Sufficiency of DEQ's Environmental Review under MEPA

The court is likely to find that DEQ violated MEPA because DEQ failed to take the requisite hard look necessary to sufficiently evaluate the significance of certain environmental impacts of Lucky's proposed project. First, the evidence in the EA describing the extensive impacts on wildlife by road improvements does not match the DEQ's ultimate findings on the issue. Second, as DEQ concedes, its "plan to make a plan" to mitigate potential water contamination does not meet MEPA standards. The court likely will find this evidence sufficient to show that DEQ's finding of no significant impact was arbitrary and capricious.

The record in this case contains ample evidence that road improvements will increase human development, activity, and pressure on wildlife in once remote areas.¹¹⁴ Notably, the DEQ's own Draft EA indicates that the improved road will significantly impact grizzly bears, which are protected under the federal Endangered Species Act and Montana's Nongame and Endangered Species Conservation Act, and wolverines, which are listed as a species of concern in Montana.¹¹⁵ Comments from Montana Fish Wildlife & Parks corroborate these impacts, as well as those on other sensitive species like Canada lynx, elk, mule deer, and moose.¹¹⁶ Accordingly, this extensive record showing the project's impacts on wildlife cannot support DEQ's finding of no significant impact.

The court also will likely find that DEQ violated MEPA because it failed to explain in its EA the effectiveness of specific water contamination mitigation measures. Such a showing is required when an

112. *Id.*, 255 P.3d at 94.

113. Response Br. Pl.-Appellees at *14.

114. Response Br. Pl.-Appellees at *18-19; Dep't of Env't Quality, Final Env'tl. Asses.: Expl. License Appl. #00795 at 62-68 (2017).

115. Response Br. Pl.-Appellees at *18-19; Dep't of Env't Quality, Draft Env'tl. Asses.: Expl. License Appl. #00795 at 59, 61 (2016).

116. Final Env'tl. Asses.: Expl. License Appl. #00795 at 188 (2017).

agency finds no significant impact.¹¹⁷ DEQ's failure to do so is evidence of its arbitrary and capricious decision.

Whether the court will find that DEQ disregarded key evidence showing the potential for and extent of water contamination is less predictable due to breadth of evidence presented by Appellees and Appellants. Because both sides present solid evidence on this sub-issue, the court will likely apply the rule that it cannot substitute its judgment for that of DEQ, but also should not defer to DEQ's decision without a "searching and careful review of the record" to determine whether the agency made a reasoned decision.¹¹⁸ In light of this foundation of judicial restraint and the extent of evidence provided by Appellants on the sub-issue, the court will likely find that DEQ's interpretation of the evidence of potential water contamination is reasonable, and thus complied with MEPA¹¹⁹

Notably, the outcome of the above sub-issue is not a deciding factor on the broader issue because the record indicates that DEQ arbitrarily dismissed evidence of impacts to wildlife and failed to discuss water contamination mitigation measures. Therefore, the court is likely to find DEQ violated MEPA and remand the EA to the DEQ for revision.

C. Constitutional Challenge to MEPA

In its analysis of the constitutional challenge to MEPA, the court will likely consider two arguments. On the one hand, as Appellants contend, the legislature intended MEPA to serve as a procedural, not substantive safeguard,¹²⁰ so the MEPA provision is constitutional. On the other hand, as Appellees argue, the Montana Constitution's drafters designed the right to a clean and healthful environment to prevent and remedy threats of unreasonable degradation of the environment. Under this logic, the court would find that the at-issue provision of MEPA violates the Montana Constitution.

Appellants' strongest argument on this issue stems from the legislative history demonstrating that the statute is procedural, and that an

117. *Ravalli Cty. Fish and Game Ass'n, Inc. v. Mont. Dept. of State Lands*, 903 P.2d 1362, 1370 (Mont. 1995) (citing *LaFlamme v. F.E.R.C.*, 852 F.2d 389, 399 (9th Cir. 1988) ("An 'agency must supply a convincing statement of reasons why potential effects are insignificant' . . . While it is true that mitigation measures can justify an agency's conclusions that a project's impact is not significant, an agency must explain exactly how the measures will mitigate the project's impact.")).

118. *Bitterrooters for Planning, Inc. v. Mont. Dept. of Env't Quality*, 401 P.3d 712, 718 (Mont. 2017).

119. *Mont. Env't Info. Ctr. v. Dept. of Env't Quality*, 988 P.2d 1236, 1240 (Mont. 1999).

120. MONT. CODE ANN. § 75-1-102; Legislative Envtl. Policy Office, *A Guide to the Montana Environmental Policy Act* at 2 (Mont. 2017) available at <https://leg.mt.gov/content/Publications/Environmental/2017-mepa-handbook-reprint.pdf>.

agency's findings do not bind it to a decision.¹²¹ Instead, its findings are merely a guide to a more informed decision.¹²²

Despite the strength of this argument, the court will likely give substantial weight to *MEIC*'s consideration of the 1972 Montana Constitutional Convention in its declaration that the right to a clean and healthful environment is fundamental and that the state must prevent degradation.¹²³ In *MEIC*, the court quotes Delegate McNeil explaining that the delegates' intention in establishing the right "was to permit no degradation from the present environment."¹²⁴ This quote clearly indicates that the delegates intended to safeguard the environment from degradation, particularly degradation that has not been properly assessed by state agencies. Barring injunctions under MEPA would directly contradict this language, and therefore would violate the Montana Constitution.

The court likely will not balance the maintenance of Montana's clean and healthful environment with the right to private property, as Appellants suggest.¹²⁵ *State v. Bernhard* held that the court should give the right to a clean and healthful environment greater weight than private property rights.¹²⁶ Under this precedent, the court cannot balance these rights equally.

The court's holding on this issue will determine the fate of at least two lawsuits pending in Montana district courts that request injunctive relief for alleged MEPA violations. The first, filed in April in Flathead County by county residents, alleges that DEQ violated MEPA when it approved a permit for a quarry adjacent to the Plaintiffs' residence and near an ecologically sensitive lake known for its recreational and aesthetic values.¹²⁷ The plaintiffs request an injunction, which, if granted, would require the district court to overturn the same MEPA provision.

The second lawsuit was filed in June in Meagher County by Montana Trout Unlimited, Montana Environmental Information Center, Trout Unlimited, Earthworks, and American Rivers.¹²⁸ Plaintiffs allege

121. Legis. Envtl. Policy Office, *A Guide to the Montana Environmental Policy Act* at 4.

122. *Id.*

123. *Mont. Env't Info. Ctr.*, 988 P.2d at 1249.

124. *Id.* at 1247.

125. Appellant State of Montana's Opening Br. at *8.

126. 568 P.2d 136, 138–139 (Mont. 1977). *See also* State of Montana, ex rel. Dep't of Health & Envtl. Sciences v. Green, 739 P.2d 469, 473 (Mont. 1987) (holding a law regulating motor vehicle junkyards protects the right to a clean and healthful environment, which outweighs property rights).

127. Complaint at 5, *Belk v. Mont. Dept. of Env't Quality*, <https://leg.mt.gov/content/Committees/Interim/2019-2020/EQC/mepa-court-cases/belk-engel-vailvsdeq-glacierstone-state.pdf> (Mont. April 18, 2019) (DV-15-2019-0000328-OC); Complaint at 1, 7, *Engel v. Mont. Dept. of Env't Quality*, <https://leg.mt.gov/content/Committees/Interim/2019-2020/EQC/mepa-court-cases/belk-engel-vailvsdeq-glacierstone-state.pdf> (Mont. May 6, 2019) (DV-15-2019-000404-DK). *Belk* and *Engel* were combined into one case.

128. Complaint for Declaratory Relief, *Mont. Trout Unlimited v. Mont. Dept. of Env't Quality*, https://earthjustice.org/sites/default/files/files/20-06-04_final_complaint.pdf (Mont. June 4, 2020).

that DEQ's approval of a permit application for a major copper mining project in the Smith River watershed violated MEPA because DEQ failed to adequately evaluate the potential for (1) the mine's proposed tailing facility to fail to contain toxic mine waste, and (2) the mine to pollute and deplete streamflows in the Smith River tributaries.¹²⁹ Plaintiffs request an injunction and that the court find the provision of MEPA also at issue in *Park County Environmental Council* unconstitutional.¹³⁰

V. CONCLUSION

The court will likely find that Appellees have standing and that DEQ's finding of no significant impact for Lucky's proposed mining exploration project in Emigrant Gulch violated MEPA. Whether the court finds that the at-issue provision of MEPA is constitutional rests on whether the court chooses to rely on the legislature's intent behind the at-issue MEPA provisions, or that of the Montana Constitution Convention's delegates. The court's choice could limit, or greatly expand, the power behind Montanans' fundamental right to a clean and healthful environment.

129. *Id.* at 2.

130. *Id.* at 34.